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King's Bench Walk

# Advantage Insurance v (1) Stoodley (2) Trinity Lane Insurance Co Ltd [2018] EWHC 2135 (QB)

**Summary**

This is an important decision in which Mater Davison considered two principles of general importance:

- Whether 'driving other cars' (DOC) cover under a motor insurance policy insures a liability required to be covered by section 145 of the Road Traffic Act 1988 ('the RTA'), and as a consequence, whether a DOC insurer can be a 'hybrid contractual insurer' pursuant to section 148 of the RTA;
- Where there is a dispute between insurers as to status being dealt with by way of Part 8 proceedings, whether all relevant matters as to status should be determined within those proceedings.

**Factual Background**

On 20 December 2015, Mr Stoodley (D1) was driving a BMW when it left the road and hit a tree. There were three passengers: Mr Hampton, who owned the BMW, Mr Rogers and Mr Reed. Mr Rogers was killed. Mr Reed was catastrophically injured, and has brought a claim which is likely to be valued in the millions. Mr Hampton insured himself to drive the BMW with Trinity Lane Insurance Company Ltd ('Trinity Lane'). That policy did not cover D1. Trinity Lane was therefore a section 151 insurer.

D1 had his own policy with Advantage Insurance ('Advantage'), which included a DOC extension.

In these proceedings, Advantage sought a declaration that it was not liable to indemnify D1 under the DOC extension on the basis that he had failed to comply with various provisions of the policy requiring him to report the accident and cooperate with his insurer.

**Legal Background**

Whilst Advantage might be able to refuse indemnity on the above grounds as a matter of contract, the position vis-à-vis the third-party liabilities of contractual insurers is modified by section 148 of the RTA.

Section 148(5) provides as follows:

*(5)A condition in a policy or security issued or given for the purposes of this Part of this Act providing—*

*(a)that no liability shall arise under the policy or security, or*

*(b)that any liability so arising shall cease,*

*in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such liabilities as are required to be covered by a policy under section 145 of this Act.*

Advantage sought to argue that the DOC cover conferred by its policy did not relate to a liability required to be covered by a policy under section 145, such that section 148(5) did not engage.

The relevant part of section 145 provides as follows:

*(3)Subject to subsection (4) below, the policy—*

*(a)must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain, and*

*(aa)must, in the case of a vehicle normally based in the territory of another member State, insure him or them in respect of any civil liability which may be incurred by him or them as a result of an event related to the use of the vehicle in Great Britain if,—*

*(i)according to the law of that territory, he or they would be required to be insured in respect of a civil liability which would arise under that law as a result of that event if the place where the vehicle was used when the event occurred were in that territory, and*

*(ii)the cover required by that law would be higher than that required by paragraph (a) above*

Advantage argued that "the vehicle" in section 145 is the primary vehicle insured under a policy, rather than a vehicle an insured person drives under a DOC extension.

**Procedural Background**

Advantage joined Trinity Lane to the proceedings, on the basis that Trinity Lane would be liable if Advantage was not.

Following a hearing to decide the DOC point on 27 April 2018, the Master reserved judgment. He then invited submissions on whether the *Marleasing* principle (i.e. requiring national law to be interpreted in light of EU directives) was of any application. The day those submissions were due, Advantage served a notice of discontinuance. Trinity Lane applied to set that notice aside, pursuant to CPR r.38.4. That application was heard on 2 July 2018.

Advantage argued that the ambit of the Part 8 proceedings was narrow, and confined to the resolution of the compatibility of DOC insurance and the RTA. They argued that whether Advantage was a contractual or RTA insurer was not an issue. Advantage's position was that their discontinuance of these proceedings would not be a bar to further argument as to status between insurers in subsequent proceedings.

Trinity Lane argued that it was not permissible for Advantage to open up further issues, that the Part 8 proceedings had been brought precisely to settle which insurer was liable to meet the claim, and that Trinity Lane was entitled to expect that the outcome would decide such matters.

**The Master's Judgment**

<u>(A) Does DOC cover insure a liability required to be covered by section 145 of the RTA?</u>

In relation to the substantive argument (i.e. whether a DOC extension covered a liability required to be insured by section 145 of the RTA), the Master found that it was for the following reasons:

- Sections 143 and 145 of the RTA tell drivers (and others) the type of insurance a driver requires in order to use a motor vehicle without committing an offence. The certificate issued by Advantage certified that the

policy satisfied those legal requirements, and D1 was entitled to rely upon it as stating that he could lawfully drive another car and be insured in respect of third party liabilities;
- Advantage's argument that "the vehicle" under section 145 means the principal vehicle under a policy cannot be correct where, as here, the policy and certificate offered cover for more than one vehicle or class of vehicle;
- The construction contended for by Advantage would lead to the absurd result that a driver using a vehicle under a DOC extension would be committing an offence under section 143(2) of the RTA;
- That construction would offend the *Marleasing* principle, that in applying national law, the court should interpret the provisions of Part VI of the RTA as far as possible in light of the wording and purpose of the Sixth Directive.

(B) Should the notice of discontinuance be set aside?

In relation to the issue on the second application, the Master set aside the notice of discontinuance for the following reasons:

- It was wrong to say that the delivery of his judgment would not resolve the mechanism of Advantage's liability. its status was plainly as a hybrid insurer, whose contractual obligations had been modified by section 148(5) of the RTA;
- The clear purpose of identifying the issues that arose in Advantage's claim was to achieve overall resolution of the insurance position between Advantage and Trinity Lane. CPR r.1.4(2)(i) places on the court the duty to further to overriding objective by active case management including "dealing with as many aspects of the case as it can on the same occasion". If Advantage wanted to argue that there was parity between a hybrid insurer and a section 151 insurer, that ought to have been raised in these proceedings.

**Commentary**

Both parts of this judgment will have significant implications for motor insurers in proceedings involving indemnity issues, and questions as to status.

For the time being, the judgment resolves the question of whether DOC cover insures a liability required to be covered under section 145 of the RTA. The main impact of that decision is that a DOC insurer can be the hybrid contractual insurer by virtue of section 148, and may be a section 151 insurer of a vehicle their insured is driving.

Whilst this may seem entirely obvious for the reasons set out in the Master's judgment, there had previously been a decision from a district judge going the other way. In *NFU Mutual v Tesco Insurance* (County Court at Exeter, 26 May 2015) DJ John Collins held that the correct interpretation of section 145 meant that it could not apply to a DOC insurer, but only to the principal insurer of the vehicle. The arguments that persuade the Master in this case do not appear to have been considered in that case and the judgment must now be considered to be wrong.

In relation to the setting aside of the notice of discontinuance, it puts insurers on notice that if there is a set of proceedings in which indemnity issues fall to be resolved, then any arguments as to status will need to be raised in those proceedings. The decision on this point is to be welcomed as it is more likely to bring clarity to, and early resolution of, disputes between motor insurers.

The full judgment can be found here.

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Isaac Hogarth, 13th August 2018